NA 06-0131-C h/h Spencer v. Dearborn Co.
Judge David F. Hamilton Signed on 06/06/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

MICHEAL LEE SPENCER SR.,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:06-cv-00131-DFH-WGH
	)	
DEARBORN COUNTY SHERIFF'S DEPARTMENT,	)	
DEARBORN COUNTY LAW ENFORCEMENT CENTER,	)	
DAVID LUSBY,	)	
DAVE HALL,	)	
LASHAUN WILLIAMS,	)	
CARRIE COMBS,	)	
DIETRICH,	)	
COUNTY OF DEARBORN,	)	
SWITZERLAND COUNTY JAIL,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

MICHEAL SPENCER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 4:06-cv-0131-DFH-WGH
	)	
DEARBORN COUNTY SHERIFF'S DEPARTMENT, et al.,	)	
	)	
Defendants.	)	

ENTRY CONCERNING SELECTED MATTERS

The court, having considered the above action and the matters which are pending, makes the following rulings:

The plaintiff's motion for copies of missing pages of the affidavit filed by Dr. Lashunda Williams is granted. Dr. Williams filed and served only three (3) pages of the five (5) page affidavit. Dr. Williams shall file and serve the complete five (5) page affidavit in support of her motion for summary judgment **not later than June 12, 2007.**

The plaintiff shall have **through July 12, 2007**, in which to respond to the motion for summary judgment filed by Dr. Williams and to the motion for summary judgment filed by defendants Dearborn County Sheriff's Department,

Dearborn County Law Enforcement Center, Sheriff Lusby, Captain Hall, Officer Combs and Officer Dietrich.

Dr. Williams' motion for summary judgment relies in part upon the plaintiff's failure to respond to requests for admissions served on plaintiff on February 8, 2007. The motion relies upon deeming those requests admitted. The requests included admissions which, if conclusive, would require dismissal of plaintiff's claims against Dr. Williams. After reviewing Dr. Williams' motion for summary judgment, plaintiff filed a document on May 31, 2007 seeking relief from the admissions, which the court treats as a motion for relief under Rule 36(b) of the Federal Rules of Civil Procedure.

Plaintiff points out correctly that he was not notified expressly that he was required to respond to the requests, that he had only 30 days to respond, or that failure to respond would result in those matters being deemed conclusively established for purposes of this lawsuit. He also points out that he is not a lawyer and was not aware of these matters, and that he suffers from paranoid schizophrenia that interferes with clear thinking. The court agrees that plaintiff is entitled to relief from the effects of his failure to respond to the requests for admission.

> Once a matter is admitted, Rule 36(b) provides that it is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed. R. Civ. P. 36(b). A court may permit withdrawal or amendment of an admission if that step would promote the presentation of

> the merits of the lawsuit and if the court is not persuaded that the 3withdrawal or amendment would prejudice the requesting party in litigating the merits of the lawsuit. *Id.*; see *Hadley v. United States,* 45 F.3d 1345, 1348 (9th Cir. 1995); *FDIC v. Prusia,* 18 F.3d 637, 640 (8th Cir. 1994); *Smith v. First Nat'l Bank,* 837 F.2d 1575, 1577 (11th Cir. 1988).

In *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), the Seventh Circuit reversed a grant of summary judgment against a *pro se* prisoner-plaintiff who failed to respond to the motion for summary judgment. In reversing, the court relied on the fact that the plaintiff had not been given explicit notice of the nature of a motion for summary judgment and the consequences of failing to respond:

> As the plaintiff in this case received the motion and must have had at least a month to respond to it – if only by requesting an extension of time to file counter affidavits – he had an opportunity to respond to the motion. But bearing in mind that he is a prisoner without assistance of counsel we do not think he had a reasonable opportunity, for in moving for summary judgment the defendants as we have said failed even to cite Rule 56, much less to indicate the disastrous consequence to an opposing party of not responding to such a motion. A reasonable opportunity presupposes notice. Mere time is not enough, if knowledge of the consequences of not making use of it is wanting.

Lewis v. Faulkner, 689 F.2d at 101-02. Because the consequences of failing to respond would not be intuitively clear to a lay-plaintiff, the Seventh Circuit in *Lewis* laid down a general rule requiring that parties moving for summary judgment against a *pro se* prisoner-plaintiff must give the plaintiff notice of the consequences of failing to respond with affidavits to a motion for summary judgment. *Id.* at 102. This rule is now part of this court's Local Rule 56.1(h), applicable to all *pro se* litigants.

The reasoning of *Lewis v. Faulkner* applies to the situation in this case. Counsel for Dr. Williams properly served the requests for admissions. But the requests did not even cite Rule 36 or include a deadline for responding. There was no indication in the document itself that failure to respond in a timely manner would result in the matters being conclusively established in favor of Dr. Williams. Without such information, the requests for admissions became a trap for the uninformed. Under the reasoning of *Lewis v. Faulkner*, plaintiff Spencer is entitled to relief from the requests for admission. The court sees no unfair prejudice to Dr. Williams under these circumstances.

The court is aware that Mr. Spencer appears to have some experience with *pro se* litigation. See *Spencer v. Easter*, 544 U.S. 911 (2005) (cert. denial); *Spencer v. Earley*, 543 U.S. 1018 (2004) (vacating appellate decision for further consideration); *Spencer v. Robinson*, 532 U.S. 928 (2001) (cert. denial). In theory, it would be possible to undertake an individualized inquiry about a particular *pro se* plaintiff's familiarity with law in general and federal discovery in particular, and with his intellectual abilities. Such an individualized inquiry is not worth the effort. It would be only fair, and would impose no burden on the requesting party, to require the party requesting the admissions to give a *pro se* opponent clear notice of the nature of the requests, a deadline for response, and a statement of the consequences of failing to respond.

Plaintiff already has the requests for admission. He shall respond in writing to those requests for admission, and shall mail his responses to all counsel *and to the court* **no later than June 28, 2007**. Plaintiff's responses shall meet the standards of Rule 36(a). If he fails to do so, the requests will be deemed admitted.

So ordered.

Date: June 6, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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